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MICHAEL RODAK, JR. CLERK

In The

Supreme Court of the United States

No. 73-899

JOSEPH P. MOODY, ET AL.,
Appellants,
v.
ALBEMARLE PAPER COMPANY, ET AL.,
Appellees.

* * * *

BAXTER K. WILLIAMS, ET AL.,
Appellees,
v.
THE ALBEMARLE CITY
BOARD OF EDUCATION,
Appellants.

On Certificate from the United States Court of Appeals for the Fourth Circuit

BRIEF FOR EMPLOYER APPELLEES IN MOODY
(Albemarle Paper Company and its Successors)

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Dated: February 12, 1974

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[illegible]

[illegible]

[illegible]

[illegible]

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OPINIONS BELOW

The opinion of the district court is not reported. The opinion by the panel for the court of appeals is reported at 474 F.2d 134.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit certified in the above captioned actions a question of appellate procedure on which it desired instruction. The certificate was filed on December 6, 1973. On January 14, 1974, an order was entered by this Court granting the parties leave to file briefs in response to the question cer-

tified. Jurisdiction in this Court is predicated upon 28 U.S.C. § 1254(3).

STATUTE AND RULE INVOLVED

The question certified involves 28 U.S.C. § 46(c) and Rule 35 of the Federal Rules of Appellate Procedure.

QUESTION CERTIFIED

"Under 28 U.S.C. § 46(c) and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc*?"

STATEMENT OF THE CASE

This brief is submitted with respect only to the above-entitled *Moody* action. That litigation has proceeded as a class action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*

The district court found that certain of the employment practices of Albemarle Paper Company ("Albemarle") prior to July 2, 1965, were racially discriminatory, and that the effect of that discrimination had been perpetuated by the seniority system. The district court enjoined Albemarle and the Defendant union, Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, from discriminating against black employees, and ordered that the seniority system be modified so that plant-wide seniority would be applied when a black employee was affected. No appeal was taken from these provisions of the district court's decree, since the Defendants had consented thereto.

The district court found Albemarle's personnel testing procedures to be job-related and upheld use of such pro-

cedures. In addition, the district court, exercising its discretion under 42 U.S.C. § 2000e-5(g), declined to award back pay. Plaintiffs appealed the testing and back pay rulings to the United States Court of Appeals for the Fourth Circuit.

That appeal was heard by a panel comprised of Circuit Judge Craven and Senior Circuit Judges Boreman and Bryan. By opinions filed February 20, 1973, that panel reversed the district court on both the testing and back pay issues. In each instance, the decision was divided, with different combinations of the three judges providing the necessary majority. On the testing question, Judge Craven was joined by Judge Boreman, with Judge Bryan dissenting. On the back pay question, Judge Craven was joined by Judge Bryan, with Judge Boreman dissenting.

Following the decision of the divided panel, Employer Appellees, on March 6, 1973, filed their petition for rehearing and suggestion of a rehearing *en banc*. Defendant Halifax Local No. 425, United Papermakers and Paperworkers, AFL-CIO, also filed a petition for rehearing *en banc*.

On June 25, 1973, the Court of Appeals for the Fourth Circuit, by Clement F. Haynesworth, Chief Judge, filed its order granting the petitions for rehearing. That order provided:

> "Upon consideration of the petitions for rehearing, it appearing that a majority of the judges in regular active service, plus Senior Judges Boreman and Bryan, who were members of the original hearing panel, have voted to grant the petitions,
>
> It Is Now Ordered that the petitions for rehearing *en banc* be, and they hereby are, granted. The *en banc* hearing will be scheduled by the Clerk."

Following that order for rehearing, Employer Appellees on July 3, 1973, filed a motion for leave to file a supplemental brief for rehearing *en banc*. Plaintiff Appellants also filed a motion for leave to file a supplemental brief on rehearing *en banc*. Appellants' motion did not challenge the ordered *en banc* procedure, but rather argued that case developments subsequent to the panel decision required supplemental briefing, and that such briefing was also needed to respond to the arguments of Appellees. The United States Equal Employment Opportunity Commission ("EEOC") also filed a motion for leave to file a supplemental brief as *amicus curiae*. The requested leave to file supplemental briefs was granted on July 9, 1973. By August 31, 1973, all parties had filed supplemental briefs. In their supplemental brief, Appellants' arguments were addressed entirely to the merits of the issues presented on the appeal; in no way did Appellants challenge the propriety of the ordered *en banc* rehearing, nor even raise the question of Senior Circuit Judges Boreman and Bryan having voted on the petitions for rehearing, despite the express reference thereto contained in the court's order granting the petitions for rehearing *en banc*.

Oral argument on the rehearing *en banc* was held on October 2, 1973, and in the course thereof, no question was raised by any party relating to the propriety of the *en banc* rehearing procedure.

After the matter had thus been submitted to the *en banc* court for decision, the parties were advised on or about December 6, 1973, that the Court of Appeals for the Fourth Circuit was seeking Supreme Court certification of a question encountered in *Moody* and in *Baxter K. Williams, et al. v. The Albemarle City Board of Education, etc.*, No. 73-1479.

The question as certified is:

> "Under 28 U.S.C. § 46 and Rule 35 of the Federal Rules of Appellate Procedure, may a senior circuit judge, a member of the initial hearing panel, vote in the determination of the question of whether or not the case should be reheard *en banc*?"

The certification is from two separate actions. In its certificate, the court has stated the circumstances in which the question arises in *Moody*:

> "In *Moody*, two senior circuit judges were members of the original hearing panel and participated in the decision. Upon a suggestion of a rehearing *en banc*, each voted for it. Though a majority of the judges in regular active service did not vote for an *en banc* rehearing, the votes of the two senior circuit judges were counted providing a majority of the counted votes in favor of rehearing *en banc*. On that basis, a rehearing was ordered and held, the two senior judges participating in the hearing as provided in 28 U.S.C. § 46. If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision with respect to an award of back pay." (Certificate at 2.)

In contrast, in *Williams*,

> "No formal order has been entered on the petition for rehearing with a suggestion of rehearing *en banc*, because the question of the right of the senior circuit judge to vote arose." (Certificate at 2.)

On January 14, 1974, the Supreme Court granted leave to the parties to file briefs in response to the question certified by the United States Court of Appeals for the Fourth Circuit.

SUMMARY OF ARGUMENT

The legislative history and judicial interpretation of 28 U.S.C. § 46(c) make clear that § 46(c) is merely a

grant of *en banc* power to the courts of appeals and that the courts themselves have broad discretion in establishing specific procedures for the initiation of their *en banc* power. The majority of judges in regular active service may exercise initiation responsibility for *en banc* rehearings or they may entrust such responsibility to some other group of circuit judges. Such an entrustment is precisely what the Fourth Circuit has done in committing the initiation decisions for rehearings *en banc* to the circuit judges in regular active service and the senior circuit judges who sat on the original hearing panel. This practice results in an effective and efficient use of *en banc* rehearings in the Fourth Circuit and should therefore be upheld as a valid exercise of the court of appeals' discretionary power.

Even if this Court holds that the Fourth Circuit's practice is invalid, past decisions of this Court indicate that such a decision should not be applied to invalidate the rehearing *en banc* ordered in *Moody*. Since the rehearing has already been held in *Moody* and a tentative vote announced by the court *en banc* contrary to the panel's decision, this Court's decision should be given prospective effect only.

ARGUMENT

I.

The *En Banc* Rehearing Practice of the United States Court of Appeals for the Fourth Circuit Is Properly Within that Court's Procedural Discretion To Provide the Manner in Which *En Banc* Rehearings Will Be Initiated.

An affirmative answer to the questions presented by this certification is required by this Court's decisions in *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247 (1953). It is wrong to read 28 U.S.C.

§ 46(c)[1] and conclude that the sole procedure available to the courts of appeals for initiation of *en banc* proceedings is a majority vote by the circuit judges in regular active service. *Western Pacific* makes clear that the § 46(c) clause, "unless a hearing or rehearing before the court *en banc* is ordered by a majority of the circuit judges of the circuit who are in regular active service," is merely a grant of *en banc* power to the courts of appeals; the courts themselves have broad discretion in establishing specific procedures for initiation of their *en banc* power.

The precise question raised in *Western Pacific* was whether a litigant by virtue of § 46(c) had a right to compel the full court of appeals to determine whether it would exercise its *en banc* power. In answering this question in the negative, Chief Justice Vinson concluded that a study of the legislative history of § 46(c):

> "makes it quite clear that the draftsmen intended to grant the *en banc* power and no more; the court itself was to establish the procedure for exercise of the power." 345 U.S. at 257.

The opinion makes clear that in establishing that pro-

[1] 28 U.S.C. § 46(c) was enacted by Congress in 1948 and amended in 1963. The statute as enacted before with the italicized words indicating the language added to the 1963 amendment:

> § 46. Assignment of judges; divisions; hearings; quorum
>
> . . . .
>
> (c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. *A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.*

cedure, each court of appeals has a wide latitude of discretion:

> "Because § 46(c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised.
>
> • • •
>
> "Having wide discretion the court may provide that the power may be called into play by any procedure convenient to the court . . . ." 345 U.S. at 259.

And moreover,

> "In our view, § 46(c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." 345 U.S. at 250.

Furthermore, the Court observed that initiation of rehearings *en banc* by a vote restricted to the judges in active service would be appropriate, but was not required. As an alternative, this Court expressly sanctioned a procedure whereby the majority entrusts the responsibility for initiation of the *en banc* proceeding to the panel that had initially heard the case. 345 U.S. at 259. This Court's view of the discretionary *en banc* power was succinctly summarized in the following passage:

> "Consistent with the statute, the court may, as has been shown, adopt a practice whereby the majority of the full bench may determine there will be hearings or rehearings *en banc*, or they may delegate the responsibility for the initiation of the *en banc* power to

the divisions of the court. But in recognizing the full scope of § 46(c), the full membership of the court will be mindful, of course, that the statute commits the *en banc* power to the majority of active circuit judges so that a majority always retains the power to revise the procedure and withdraw whatever responsibilities may have been delegated to the division. And, recognizing the value of an efficient use of the *en banc* power, the court should adopt such means as will enable its full membership to determine whether the court's administration of the power is achieving the full purpose of the statute so that the court will be better able to change its *en banc* procedure, should it deem change advisable." 345 U.S. at 261.

By recognizing that the courts of appeals should have broad discretion in determining whether to hear a case *en banc*, this Court's decision in *Western Pacific* demonstrated *en banc* proceedings are internal mechanisms designed for use by a court of appeals in discharging its responsibility to formulate precedents uniformly and authoritatively.[2] In particular, these proceedings are used to resolve intra-circuit conflicts and lend the authority of the full bench to a decision resolving an important "question of law" in the circuit. The procedure employed to initiate the *en banc* proceeding not only must properly identify "appropriate" cases but must also consider the effect of *en banc* proceedings on the circuit court's docket. An effective procedure, therefore, must be flexible and tailored to the particular circumstances within each circuit. By recognizing broad discretionary power in each court of appeals, this Court has ensured that *en banc* proceedings will be properly utilized in all circuits.

Subsequent events have not affected the principles an-

[2] *See* Note, *En Banc Hearings In The Federal Courts of Appeals Accommodating Institutional Responsibilities*, 40 N.Y.U. L. Rev. 568, 574-592 (1965).

nounced in *Western Pacific*. In two decisions by this Court, *U.S. v. American Foreign SS. Corp.*, 363 U.S. 685 (1960), and *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 4 (1963), the broad discretionary power of the courts of appeals over exercise of their *en banc* power was again endorsed. *American Foreign* dealt with the question whether senior circuit judges, members of the initial hearing panel, were entitled to sit on the court *en banc* when the case was reheard. The opinion specifically endorsed *Western Pacific* by noting that *American Foreign* did not involve any issue as to the procedure to be followed by a court of appeals in determining whether a hearing or rehearing *en banc* was to be ordered and by stating:

> "In the *Western Pacific Railroad Case*, . . . it was held that this question is largely to be left to the intramural determination by each of the Courts of Appeals. 'The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing . . . .'" 363 U.S. at 688. (Emphasis added.)

The principles of broad procedural discretion as expressed in *Western Pacific* and ratified in *American Foreign* have not been weakened by the 1963 amendment to § 46(c)[1] nor by the promulgation of Rule 35 of the Federal Rules of Appellate Procedure.[2] Any suggestion that the dicta of the circuit courts in *Zahn v. International Paper Company*, 369 F.2d 1055, 1061, 1062 (2d Cir. 1972), and in *Allen v.*

[1] See fn. 1, *supra*, enumerated portion. That amendment was enacted to modify the situation existing after the Court's decision in *American Foreign* so that there is no doubt that a circuit judge of the circuit who has retired from regular active service is competent to sit on an *en banc* rehearing of a case in which he sat in the court at the original hearing thereof.

[2] The notes of the Advisory Committee relative to Rule 35 make clear that the rule was promulgated in aid of the principles announced in *Western Pacific*.

Johnson, 991 F.2d 127, 133 (4th Cir. 1993), have somehow limited that broad discretionary power is contrary to *Western Pacific* and is simply erroneous.[5]

In summary, the very essence of *Western Pacific* and subsequent decisions is that the respective courts of appeals have a wide discretionary power to formulate their own procedures for initiation and implementation of the *en banc* power. Because of that broad discretion, we believe that the question certified in these actions must be answered in the affirmative.

II

The En Banc Procedure Followed by the Court of Appeals for the Fourth Circuit in Moody Was Within Its Discretion

When measured by the principles set forth in *Western Pacific*, the practice utilized in the Fourth Circuit for initiating *en banc* rehearings was clearly valid. In the exercise of its broad discretion, the court of appeals entrusted the *en banc* decision to a vote by the senior circuit judges who sat on the original hearing panel and the circuit judges in regular active service. This entrustment is virtually indistinguishable from the entrustment expressly approved in *Western Pacific*. If an entrustment of initiation responsibility to the original panel is proper, surely there can be nothing improper about the entrustment involved in the

[5] The opinions in *Cohen* and *Allen* were addressed to *en banc* questions different from the one under consideration here. *Cohen* dealt with the question whether the "majority" referred to in § 46(c) was an absolute majority of the judges in regular active service or a majority of the regular active judges qualified to vote. *Allen* was focused on the question whether a senior judge member of a panel which had originally heard the case but had not rendered a decision was competent to sit on the *en banc* court rehearing of the same case. In any event, it is clear that there is nothing in *Western Pacific* which prevents a particular court of appeals from setting for itself *en banc* procedures which may be more restrictive than those permitted under *Western Pacific*.

Fourth Circuit's practice. Utilization of such a practice should be considered within the broad discretion of the court of appeals, since it is apparent that this initiation procedure results in effective use of *en banc* proceedings in the Fourth Circuit.

The Court of Appeals for the Fourth Circuit is composed of seven active circuit judges and two senior circuit judges. The two senior circuit judges are Judge Boreman and Judge Bryan. They are retired judges pursuant to 28 U.S.C. § 371 but are important forces on the court. Both of these senior circuit judges assume a full circuit judge role in the court's proceedings; during the months they sit Judge Boreman sits during approximately two thirds of the court's sessions and Judge Bryan sits approximately three fifths of the time. Judges Boreman and Bryan therefore shoulder caseloads approximately equal to two thirds and three fifths, respectively, of the caseload carried by an active judge on the court of appeals.[8]

In view of the active role the court of appeals' decision to have Judges Boreman and Bryan participate in the *en banc* decision when they have been members of the original hearing panel is certainly reasonable. Active participation in the docket gives them the perspective necessary to determine whether a case being considered for *en banc* proceedings creates or raises the potential for intra circuit splits between differently composed panels. In addition, their research and preparation, resulting from participation in the initial panel hearing, prepare them for making an intelligent evaluation of the question whether the issues involved in a particular case require an authoritative decision rendered by the full bench.

The conclusion that the Fourth Circuit's practice is not

[8] *See* letter from Mr. William K. Slate, II, dated January 25, 1974, in Appendix A.

an abuse of its discretion is also supported by the fact that at least one other court of appeals employs *en banc* initiation procedures which allow voting by senior judge members of the initial hearing panel. Contrary to appellant's contention that the Fourth Circuit's practice is unique, a recent poll of the circuits indicates that at least the Ninth Circuit employs procedures virtually identical to those used in the Fourth Circuit.[1]

No good reason exists for interpreting § 46(c) to provide that a senior circuit judge is a member of the court *en banc* for rehearing purposes, but is not entitled to vote in the decision whether the case should be reheard *en banc*. The theory that such an interpretation is required to effectuate a Congressional intent to vest determination of future doctrinal trends in the active judges of the circuit does not hold water in view of the 1963 amendment of § 46(c). By providing for senior circuit judge membership on the *en banc* court for rehearing purposes, the 1963 amendment makes clear that the major doctrinal trends set in *en banc* rehearings will be formulated by both the judges in regular active service and senior circuit judges sitting on the initial hearing panel.

In addition, the Fourth Circuit's practice is consonant with the general statutory framework for the federal judicial system which makes maximum use of the judicial services of senior circuit judges. 28 U.S.C. § 294 provides for the designation and assignment of senior circuit judges to perform such judicial duties as they are willing and able to undertake. When so designated and assigned, 28 U.S.C. § 296 provides that senior circuit judges shall have the following powers:

[1] *See* letter from Mr. William B. Luck, dated February 6, 1974, in Appendix A.

> "Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated or assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices."

Finally, the legal questions involved in the *Moody* panel decision were manifestly appropriate for rehearing *en banc*. The initial hearing panel was divided three ways on the issues presented. The panel's decision on each of the major issues was dependent upon the votes of senior circuit judges on the panel. Other decisions of the Fourth Circuit and other circuits are apparently in conflict with portions of the panel decision. Appellants themselves claimed that decisions subsequent to the panel determination required consideration. Moreover, the issues presented were and are important issues. The existence of such factors supported the need for *en banc* determination. That determination was ordered by the court, and the matter was heard by the full court. Appellants, having been advised by the court that the *en banc* decision will modify the panel determination which was favorable to them, now argue that the briefing, argument and rehearing by the court should be ignored. Clearly, such a result is not consistent with efficient judicial administration.

This Court, therefore, should uphold the court of appeals' practice as within the scope of the court's discretionary power outlined in *Western Pacific*, and, in fact, should commend the procedure as one which appropriately accommodates discretionary *en banc* power with the judicial duties and service of Senior Circuit Judges Boreman and Bryan in the Fourth Circuit.

III.

Even if the En Banc Rehearing Procedure of the Fourth Circuit Is in Error, Correction of any such Procedural Error Should Not Operate to Nullify the Rehearing En Banc Ordered and Held in Moody.

A negative answer to the question certified would invalidate the well-established *en banc* initiation practice followed in the Fourth Circuit and would repudiate the clear statement in *Western Pacific* that courts of appeals have broad discretionary power to formulate their own *en banc* procedures. It would mean that all courts of appeals must adhere to one specific procedure for the exercise of their *en banc* power. Under such a rule, *en banc* proceedings will be valid only if they have been ordered by a majority vote of the circuit judges in regular active service.[8] In short, a negative answer to the question certified in effect would be tantamount to creation of a new rule of civil appellate procedure.

When this Court has created a new rule in the past, it has often been faced with the question whether the rule should be given prospective or retroactive effect. In *Linkletter* v. *Walker*, 381 U.S. 618, 628 (1965), Justice Clark traced the history of prospective judicial decision-making and concluded that "the Court may in the interest of justice make the rule prospective."

This Court has indicated at least three factors to be relevant to every prospective effect inquiry. The first of these factors is an evaluation whether the purpose of the new rule requires either prospective or retroactive application. *Williams* v. *U.S.*, 401 U.S. 646, 653 (1971); *Linkletter* at 629. The second factor is a consideration of the amount of injustice and hardship a party would suffer from a retroactive application of the new rule. *Lemon* v. *Kurtzman*, 411 U.S. 192, 207-209 (1973); *Chevron Oil Co.* v.

[8] Although the statute does not mention "voting."

Huson, 404 U.S. 97, 108 (1971), *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969); *Allen* v. *State Board of Elections*, 393 U.S. 544, 571-572 (1969); *England* v. *Medical Examiners*, 375 U.S. 411, 422 (1964). The final factor is the impact retroactive application would have on the administration of justice and the integrity of the judicial process. *Linkletter* at 637.

When these three factors are applied to the facts and circumstances in the *Moody* case, it is clear that if this Court's decision should, which it should not, be to promulgate a new rule of appellate procedure that rule should not be applied to invalidate retroactively the rehearing *en banc* ordered in *Moody*.

The purpose of any new procedural rule can only be to improve the administration of justice. Translated to the issue raised here that purpose could only be to adopt a more effective process for the selection of appropriate cases for rehearing *en banc*. But *Moody* is now identified as a most appropriate case for *en banc* rehearing. It clearly involves issues of great public importance and reveals a deep cleavage of judicial thought applicable to those issues. What better case is there upon which to bring to bear the full authority of the court?

Furthermore, in *Moody*, but not in *Williams*, the parties have filed extensive briefs with the *en banc* court, oral argument has been held and a decision modifying the panel's decision on back pay has been, at least tentatively, reached. The injustice and hardship upon the litigants to now erase all their efforts is obvious. Moreover, the law in the Fourth Circuit will remain unsettled and speculative since it is now known that divergent results may be possible depending upon which judges may hear a future case.

Finally, in appellees' view the majority of the judges in active service on the Fourth Circuit can change their procedure for selecting cases for *en banc* rehearing whenever

hey wish. But to throw the "flag" after the play has resulted in a touchdown is not only unusual, but also a ittle injudicious.

For these reasons it seems clear that, even if this Court s compelled to announce a new procedural rule, at least in he case of *Moody* its application should be prospective only.

CONCLUSION

The question certified should be answered in the affirmative, thereby validating the *en banc* rehearing practice in the Fourth Circuit which allows senior circuit judges, who were members of the initial hearing panel, to vote on the question whether a case should be reheard *en banc*. If however, this Court reaches the opposite conclusion and answers the question certified in the negative, it should be ordered that such a decision is not to be applied to invalidate the rehearing *en banc* ordered and held in *Moody*.

Respectfully submitted,

ALBEMARLE PAPER COMPANY, DELAWARE
ALBEMARLE PAPER COMPANY, VIRGINIA
HOLLINGER WALLBOARD CORPORATION
ETHYL CORPORATION

By FRANCIS V. LOWDEN, JR.

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Dated: February 12, 1974

CERTIFICATE OF SERVICE

I, Frances V. Lawden, Jr., counsel for the Employer Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief for the Employer Appellees in the United States Mail, first class postage prepaid, this 15th day of February, 1974, addressed to: Jack Greenberg, Esq., 10 Columbus Circle, New York, New York 10019; J. Levonne Chambers, Esq., East Independence Plaza, 951 S. Independence Blvd., Charlotte, North Carolina; Thomas F. Clayton, Esq., 307 W. Franklin Street, P. O. Box 236, Warrenton, North Carolina; Conrad O. Pearson, Esq., 203½ E. Chapel Hill Street, P. O. Box 1428, Durham, North Carolina; Warren Woods, Esq., Wilson, Woods & Villahon, Suite 1032, Pennsylvania Building, Pennsylvania Avenue & 13th Street, Washington, D. C. 20004; William K. Slate, II, Clerk, United States Court of Appeals for the Fourth Circuit, Richmond, Virginia 23219.

FRANCIS V. LAWDEN, JR.
Counsel for Employer Appellees

APPENDICES

A LETTER APPENDIX

Letter from Mr. William K. Slate, II, dated January 25th, 1974

William K. Slate, II
Clerk

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Tenth and Main Streets
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January the Twenty fifth, 1974

F. V. Lowden, Jr., Esquire
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Re: En Banc Hearings

Dr. Mr. Lowden:

This letter is in response to yours dated January 23, 1974 regarding the above referenced subject.

It should be established from the outset that any "estimates" of how often Senior Judges Boreman and Bryan sit with this court, as well as the amount of caseload which they carry, would be just that - an estimate. Finite figures could only be secured by a case by case analysis of over 1600 cases processed during the last fiscal year. However, after discussing your inquiry with my staff, I do believe it would be fair to say that Judge Boreman sits during approximately two-thirds of the court's sessions. As a result he carries approximately two-thirds caseload. Senior Judge Bryan sits with the court during approximately three-fifths

of the court's sessions. He therefore carries approximately three-fifths caseload.

I am hopeful that the above information will be of assistance to you.

Sincerely,

/s/ William K. Slate, II
William K. Slate, II

Letter from Mr. William B. Luck, dated February 6, 1974, with the relevant portions of Ninth Circuit's General Order No. 15 enclosed:

Office of the Circuit Executive
United States Court of Appeals for the Ninth Circuit
P. O. Box 42068
San Francisco, California 94101

William B. Luck
Circuit Executive

February 6, 1974

F. V. Lowden, Jr., Esq.
Hunton, Williams, Gay & Gibson
700 East Main Street
P. O. Box 1535
Richmond, Virginia 23212

Dear Mr. Lowden:

Attached is a copy of this court's General Order No. 15 which is titled, "In Banc Hearings."

Sincerely yours,

/s/ William B. Luck
William B. Luck

WBL:mjg
attachment

U.S. Court of Appeals
Rev. 5/14/69
for the Ninth Circuit

General Order No. 15
In Banc Hearings

1. *Definitions.* As used herein, "hearing" means the initial hearing in this Court, whether by a panel or by the Court in banc. "Rehearing" means any subsequent hearing by the panel or by the Court in banc, whether or not an opinion has been issued and whether or not the initial hearing was by a panel or by the Court in banc.

2. *Panel recommendations for a rehearing in banc.* Should the panel to which a case has been assigned determine, *sua sponte*, or upon consideration of a suggestion by a party or of a member of the Court, or of a member of the panel, that the case should be reheard in banc or that the members of the Court in active service should decide whether the case should be so reheard, it shall: (1) send a memorandum to the Chief Judge so advising him, indicating why this course is appropriate, and shall provide him with a sufficient number of copies so that the Chief Judge may distribute the memorandum to all members of the Court in active service; (2) notify the Clerk that a proposal for a rehearing is under consideration and that the mandate should not issue unless and until he is so advised by the panel or the Chief Judge; and (3) supply the Chief Judge with a form of order, and copies thereof for like distribution, authorizing the withdrawal of the assignment of the case from the panel and providing for a rehearing in banc on a day to be fixed. The order shall also specify the question or questions with which the Court, in banc, will be particularly concerned, at the same time making it clear

that the Court will consider all issues involved. A panel should not ordinarily request a rehearing in banc unless and until the members of the panel have first expressed their views in the form of a proposed opinion or opinions.

5. Action upon panel recommendation for a rehearing in banc. Upon receipt of a memorandum and form of order of the kind described in subsection 2 of this General Order, the Chief Judge shall distribute copies thereof and call for a vote by written memorandum addressed to all judges entitled to vote thereon, or at a Court meeting. All available judges shall vote thereon, but no vote shall be cast until the expiration of five days in order to allow any judge who wishes to do so, to express his views on the matter.

If a majority of the members of the Court in active service and of any retired member of the Court who is on the panel in question agree upon an order of the kind described in subsection 2 of this General Order, the same shall be filed and the substance thereof, but not the vote thereon, shall be communicated to the parties, and the case shall be recalendared for in banc hearing. If such an order, proposed by a panel, is not agreed upon by a majority of the members of the Court in active service and of any retired member of the Court who is on the panel in question, the panel shall then determine what alternative course it shall follow and manifest the same by entry of a panel order or by a memorandum to the Clerk. In the event a party suggests a rehearing in banc, and a majority of the members of the Court in active service rejects the suggestion, this fact, but not the vote thereon, shall be noted in the panel order granting or denying the petition for rehearing.

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B. STATUTORY APPENDIX

28 USC § 46:

"**§ 46. Assignment of judges; divisions; hearings; quorum**

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

"As amended Nov. 13, 1963, Pub. L. 88-176, § 1(b), 77 Stat. 331."

Rule 35 of the Federal Rules of Appellate Procedure:

"DETERMINATION OF CAUSES BY THE COURT IN BANC:

"(a) **When Hearing or Rehearing in Banc Will be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

"(b) **Suggestion of a Party for Hearing or Rehearing in Banc.** A party may suggest the appropriateness of a hearing or rehearing in banc. The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

"(c) **Time for Suggestion of a Party for Rehearing in Banc; Suggestion does Not Stay Mandate.** If a party desires to suggest a rehearing in banc, the suggestion must be made within the time provided by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate."